

Supreme Court, U. S.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1975

No. 75-1692

JOHN DAVID MOORE, JR.,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975

No.

JOHN DAVID MOORE, JR.,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

The Petitioner, JOHN DAVID MOORE, JR., respectfully prays a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on March 9, 1976.

OPINIONS BELOW

The Findings of Fact and Conclusions of Law of the District Court for the Western District of Texas, El Paso Division, are not officially reported, but appear in Appendix D hereto. The opinion of the Court of Appeals was not reported, having been stamped: DO NOT PUBLISH; however, this opinion appears in Appendix G hereto. A copy of the order denying the Petition for a Rehearing en banc, entered April 22, 1976, appears in Appendix H hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on March 9, 1976. A Petition for a Rehearing en banc was timely filed and an order denying the Petition for a Rehearing en banc was entered on April 22, 1976. This Petition for Certiorari was timely filed within thirty (30) days of that date. This Court's jurisdiction is invoked under Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED

I.

Whether an accused may be properly convicted of possession of narcotics where the evidence revealed only his presence with another at the residence where the contraband was seized, without additional showings of occupancy, control, or other affirmative links.

II.

Whether the hearsay tip of an unidentified informer contained in the affidavit of the search warrant may properly be used by the Government in its final argument for conviction, and by the Court in its Findings of Fact and Amended Findings of Fact supporting conviction, especially in the instant case where the Government opposed disclosure and the Court denied disclosure of this same unidentified informant.

CONSTITUTIONAL PROVISIONS INVOLVED

The following pertinent portion of the Fifth Amendment to the Constitution of the United States:

"No person shall be . . . deprived of life, liberty, or property, without due process of law, . . ."

and the following pertinent portion of the Sixth Amendment to the Constitution of the United States:

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ."

STATEMENT OF FACTS

On January 7, 1975 a warrant to search Apartment No. 60, Hill Country Apartments, El Paso, Texas was issued to Federal narcotics agents on the strength of a hearsay tip from an unidentified informer that one John David Moore and others were possessing heroin and residing at the apartment. Entry was made into the apartment that same day. John David Moore and Isabel Cueva were arrested within the apartment and a large amount of heroin was seized. Before trial at the United States District Court, defense counsel made two motions: (1) that the evidence should be suppressed because the search was unconstitutional; and (2) that identity of the unnamed informant should be disclosed. At time of trial, the case against Isabel Cueva was dismissed on the motion of the Government. John David Moore proceeded to trial on a plea of not guilty. The motions for suppression and disclosure were carried through this trial on the merits.

The trial produced no other evidence than the fact that John David Moore was present at the time of the search and arrest. At one point during the trial the

Government made one attempt to show an affirmative link; however, it was fruitless.

Q. "... Did you find any indication of ownership of the apartment?

A. No, Sir, I don't believe I did" (Tr. 53)
(Appendix B)

At the conclusion of the trial both sides made their final arguments. The Government relied heavily on the informer's designation of Moore as the resident of the apartment and the possessor of the heroin in its argument that it had proved guilt beyond a reasonable doubt. (Appendix A) The Court overruled the Defendant's motions and found the Defendant John David Moore guilty of possessing heroin with intent to distribute, sentencing him to confinement for six years and to a special parole term of six years. John David Moore has been and is now in the La Tuna Federal Correctional Facility in Texas. In support of its judgment and conviction the District Court issued Findings of Fact and Conclusions of Law (Appendix D). The Findings of Fact included references to the unidentified informant's assertions in the Finding of Fact No. 12 which concerned the "occupancy" of the apartment.

"Information revealed by the confidential informant and relied upon in preparation of the affidavit disclosed that JOHN DAVID MOORE was the occupant of apartment #7, Hill Country Apartments, 213 Argonaut, El Paso, Texas."

(Appendix D)

Over the objections of defense counsel, the Court refused to excise the hearsay portion and revised the

wording of Finding No. 12 so that the hearsay allegations were even more deeply embedded in the proof of guilt.

"Information revealed by the confidential informant and relied upon in the preparation of the affidavit disclosed that John David Moore was the occupant of Apartment 60, Building No. 7, Hill Country Apartments, 213 Argonaut, El Paso, Texas, at the time of the seizure."

(Appendix E)

During the appeal to the Fifth Circuit, the Government followed the reasoning of its final arguments and of the Court's Finding of Fact No. 12, and contended that the appellant had overlooked the important proof contained in the search warrant affidavit.

"Appellant has omitted to recite that the confidential informant told the agents that appellant was in possession of a quantity of heroin at his apartment, the subject of the affidavit, only two hours prior to execution of the search warrant. It is difficult to imagine a more recent connection in time between information provided by a confidential informant and observance of the actual facts by agents. The allegation by the confidential informant that John David Moore was the occupant of the apartment which was the subject of the search warrant was borne out by the agents' arrival within a two-hour time span (Tr. 18)."

(Appendix F)

It also buttressed this testimony by reference to the allegations of other unidentified informants supporting the allegations in the search warrant. (Appendix F)

The Fifth Circuit affirmed the conviction with an opinion, (Appendix G) which was silent as to any fact or legal reasoning contrary to this Petitioner's position.

REASONS FOR GRANTING THE WRIT

- (1) **Whether An Accused May Be Properly Convicted Of Possession Of Narcotics Where The Evidence Revealed Only His Presence With Another At The Residence Where The Contraband Was Seized, Without Additional Showings Of Occupancy, Control, Or Other Affirmative Links.**

The Petitioner contends that this defendant was convicted of possession of contraband on a showing of mere proximity. The only evidence which was presented which was competent and admissible on the question of guilt or innocence was the testimony of four police officers, the only witnesses produced by the Government. The testimony of the officers was as follows:

1. Agent Baden testified that he observed the entry into the apartment from a distance of approximately twenty yards (Tr. 19); but that he did not go in (Tr. 19), or participate in the search (Tr. 20).

2. Agent Uribe testified that he was not present at the apartment and did not go in at any time (Tr. 27). He made references to the surveillance conducted by himself and others of the apartment (Tr. 30, Tr. 31-35), but was not asked and did not answer any questions about the fruits of such surveillance.

3. Agent Contreras testified that he entered the apartment from the rear after the other officers had already entered (Tr. 42). He also testified that he observed Isabel Cuevas sitting on the couch and JOHN DAVID MOORE lying face down on the living room floor (Tr. 48).

4. Agent McWhorter testified that he participated in the search (Tr. 50) but did not elaborate as to the time or method of his entry into the apartment (Tr. 49-60). Agent McWhorter testified that both "... J. D. MOORE and young lady named Cueva . . . , " were present (Tr. 52). *He was then asked, "did you find any indication of ownership of the apartment?" He answered, "No, sir, I don't believe I did."* (Tr. 53) (Appendix B)

Agent McWhorter also referred to his participation in the surveillance, but was not asked, and did not answer any questions about the fruits of such surveillance (Tr. 53-60), besides his description of the photographs of the apartment complex and the outside of the apartment.

Conviction of possession on the meager evidence presented above runs directly contrary to the thrust of Fifth Circuit case law on that subject:

"... mere presence in the area where the narcotic is discovered or mere association with the person who does control the drug or property where it is located, is insufficient to support a finding of possession." *United States v. Stephenson*, 474 F.2d 1353 (5th Cir. 1973); Accord, *United States v. Martin*, 483 F.2d 974 (5th Cir. 1974).

No evidence was presented showing the appellant's actual possession of the contraband, and constructive presence may not be shown by mere presence. *Martin*, supra, at 974-975.

In addition, no evidence was produced to show that the appellant exercised any control of ownership over the premises, *United States v. Ferg*, 485 F.2d 914 (5th Cir. 1974). Regardless of the feelings and opinions of the agents and the prosecutor, absolutely no evidence such as utility bills, letters, clothing, rent receipts, initialled personal effects, or any similar items were introduced during the trial. Furthermore, no testimony was presented regarding the prior activity of Petitioner in or around the apartment. The Petitioner's conviction on such evidence, or lack of evidence, presents a compelling rationale for granting a Writ of Certiorari.

(2) Whether The Hearsay Tip Of An Unidentified Informer Contained In The Affidavit Of The Search Warrant May

Properly Be Used By The Government In Its Final Argument For Conviction, And By The Court In Its Findings Of Fact And Amended Findings Of Fact Supporting Conviction, Especially In The Instant Case Where The Government Opposed Disclosure And The Court Denied Disclosure Of This Same Unidentified Informant.

Here the unexamined statements of the undisclosed informant were used squarely on the issue of guilt by the Government in its final argument (Appendix A), and its proposed Findings of Fact (Appendix C), and by the District Court in its Findings of Fact (Appendix D) and Amended Findings of Fact (Appendix E). Such use of hearsay allegations of undisclosed informants is violative of due process and the rights of confrontation. It is well settled that extra-judicial statements of an informer who did not confront the defendant in court may not be considered on the question as to guilt or innocence by Judge or jury. *Mersel v. United States*, 420 F.2d 517 (5th Cir. 1970), at Footnote 4; *Dennis v. United States*, 302 F.2d 5, 10 (10th Cir.); *La Placa v. United States*, 354 F.2d 56, 59 (1st Cir.), cert. denied, 383 U.S. 927, 86 S.Ct. 932, 15 L.Ed.2d 846.

One might be tempted to minimize the use of this hearsay testimony by the District Court in spite of its pervasive appearance at every stage and in spite of the fact that it furnishes the "missing link" necessary to a finding of sufficient evidence. However, given the fact that the Government opposed disclosure and the District Court denied disclosure of this informant, it is hard to see how even a "minimal" use on the question

of guilt would not run afoul of the confrontation clause or operate as a waiver of the Government's right of non-disclosure.

"Nevertheless, the court is not unmindful of the fact that privilege cannot be used as both a sword and a shield. A party cannot choose to disclose only so much of allegedly privileged matter as is helpful to his case. 8 Wigmore, Evidence § 2327 (McNaughton Rev. 1961). Once the party begins to disclose any confidential communication for a purpose outside the scope of the privilege, the privilege is lost for all communications relating to the same matter." *Burlington Industries v. Exxon Corporation*, 65 F.R.D. 26 (1974) at 46.

Any use of the informer's allegations by the prosecution and by the Court on the question of guilt is clearly outside of the scope of the informer privilege.

Thus, we have a double error: first, the improper use of the testimony by the prosecution, and the Court: second, the refusal to disclose the informer's identity after such improper or attempted use waived the privilege of non-disclosure.

CONCLUSION

Narcotics cases continue to occupy a large portion of the Federal docket, and there is no doubt that narcotics abuse poses a grave danger to our society. The instant case involves heroin, the most dangerous narcotic of all; and not only does it involve heroin, but it involves a substantial quantity of heroin (192.5

grams). But much more importantly, it involves the due process clause of the Fifth Amendment and the Right to Confrontation Clause of the Sixth. In the cold black and white of the Constitution there is no exception for heroin; perhaps there should be, but there isn't.

In this case an informer's tip provided probable cause for a search, but the question is: Did it provide more? Did it provide the affirmative link which is lacking in the State's body of evidence? Common sense provided a connection between the informer's allegation and the defendant's presence at the apartment, but common sense is not legal sense. We know that we cannot allow conviction for mere presence; and we know, common sense aside, that undisclosed witnesses can never be witnesses on the issue of guilt or innocence, or even on the slimmest thread or connection involved in guilt or innocence. We know this because some 200 years ago we broke our ties with a kindred nation in part because that nation had no guarantees against such silent witnesses.

This is a hard case. Reversal goes against common sense and 192.5 grams of heroin. On the other hand, to fashion legal principles which would allow conviction in this case would seriously warp the thrust of the last two centuries of criminal law experience. The Fifth Circuit discovered one method of handling this case; it delivered an affirming opinion without facts or reasoning, stamped: "DO NOT PUBLISH." The Petitioner hopes and expects that this Honorable Court will choose a less easy but more enlightening approach.

Respectfully submitted,

JOSEPH (SIB) ABRAHAM, JR.
505 Caples Building
El Paso, TX 79901
Attorney for Petitioner

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing brief has been served upon opposing counsel of record by placing the same properly addressed in the United States Mail with adequate postage affixed thereto this ____ day of May, 1976.

APPENDICES

APPENDIX A

THE GOVERNMENT'S FINAL ARGUMENT IN
UNITED STATES v. JOHN DAVID MOORE, CAUSE
NO. EP-75-CR-82, BEFORE THE UNITED STATES
DISTRICT COURT FOR THE WESTERN DISTRICT
OF TEXAS, EL PASO DIVISION.

MR. WALKER: "Your Honor, very briefly, I'll argue the facts of the case first and then to go the defendant's motions. I think the Government has shown beyond a reasonable doubt, way beyond a reasonable doubt that John David Moore did, in fact, reside at the Apartment No. 60, Building No. 7, of the Hill Country Apartments, and he was in possession of heroin.

And I say that because a confidential informant came to Detective Uribe and said, "I have information or I have — through personal observation, know that John David Moore resides at a certain apartment here in El Paso, Texas, and he is in possession of a certain amount of heroin."

The information was proven to be correct beyond a reasonable doubt, and I think proves the case beyond a reasonable doubt, because the agents went there, and they did, in fact, find John David Moore right there in the proximity of the heroin, in possession of the heroin right there in that apartment.

So somebody who did know told the agents, and they went there, and they did find the heroin. He's charged, I believe, with possession with intent to distribute the heroin, and I think the Government has proven that aspect of the case beyond a reasonable doubt by the hat box containing the bottle of lactose, the balloons and the balance scale which measures quantities in gram units which, as the Court knows, is a common unit of measure for the selling of heroin for distribution of heroin here in El Paso County.

More than one officer identified Mr. Moore as being the Mr. Moore who is here this afternoon as being the Mr. Moore who was found in the apartment on January 7, 1975.

We know that this apartment was a location used for the distribution of heroin, because information was received, as we know, from Mr. Uribe's testimony prior to January 7 that this was a location where heroin was being sold and a surveillance was performed by the officers, so that the apartment had at least come under suspicion as being the location for the distribution of heroin.

So I think the Government has proved their case beyond a reasonable doubt. We know that the substance found there was heroin by the chemist's report.

And as to the defendant's motion, Your Honor ..."

(Emphasis supplied.)

APPENDIX B

TESTIMONY OF OFFICER McWHORTER CONCERNING AFFIRMATIVE LINKS BETWEEN DEFENDANT AND APARTMENT.

Q All right, sir. Did you find any indication of ownership of the apartment there, anything to indicate to you who might have rented the apartment or who occupied the apartment or who lived there?

MR. ABRAHAM: Your Honor, may it please the Court, I will object to that question. I think it calls for a conclusion on the part of this witness.

THE COURT: I'll sustain the objection, and rephrase your question.

Q Did you find any indication of ownership in the apartment?

MR. ABRAHAM: Your Honor, that's the question that I objected to.

THE COURT: Well, I understand that you object to it on the account it calls for a conclusion. He asked if he found any evidence, and I'll overrule your objection.

THE WITNESS: Could we get —

Q That you remember.

A Could I — could you repeat the question, please?

Q Yes. Did you find any indications of ownership of the apartment?

A No, sir, I don't believe I did.
(Emphasis supplied.)

APPENDIX C

THE GOVERNMENT'S PROPOSED FINDINGS OF
FACT IN UNITED STATES OF AMERICA v. JOHN
DAVID MOORE, NO. EP-75-CR-82.

(Title Omitted)

FINDINGS OF FACT

I. Apartment #60, Building #7, of the Hill Country Apartments, 213 Argonaut, El Paso, Texas, was under surveillance as a suspected heroin distribution point for at least 7 days prior to the arrest of the defendant in the above styled and numbered cause. Officers of the Drug Enforcement Administration Task Force, acting pursuant to a search warrant issued by the Honorable 65th Judicial District Court of the State of Texas, arrested JOHN DAVID MOORE and ISABEL CUEVA and confiscated a quantity of contraband. Information contained in the affidavit to obtain the search warrant was obtained from a confidential informant who had been in the apartment within 24 hours of the time the information was given. The information was told to Officers Edward Uribe and Alberto Aceves, together. Officer Aceves prepared the affidavit, incorporating the information provided by the confidential informant. Officer Uribe presented the affidavit to the Honorable Judge Edward Marquez, presiding, 65th Judicial District Court. Properties seized by virtue of the search warrant included approximately 5 ounces of brown heroin, contained in plastic bags, a quantity of rubber balloons, a quantity of Lactose powder, commonly used to dilute heroin for sale, and a balance beam scale graduated in gram measure-

ments, a common unit of measurement in heroin distribution. Upon entry of officers pursuant to the search warrant, JOHN DAVID MOORE was found in close proximity to the above mentioned heroin. Information revealed by the confidential informant and relied upon in preparation of the affidavit disclosed that JOHN DAVID MOORE was the occupant of apartment #60, building #7, Hill Country Apartments, 213 Argonaut, El Paso, Texas. The brown powder described in the affidavit and found pursuant to the search warrant was submitted to the Drug Enforcement Administration laboratory for an analysis.

CONCLUSIONS OF LAW

1. JOHN DAVID MOORE was the occupant of Apt. #60, building #7, Hill Country Apartments, 213 Argonaut, El Paso, Texas on January 7, 1975 at 5:00 P.M.
2. JOHN DAVID MOORE was in possession of the contraband confiscated pursuant to a search warrant executed at Apartment #60, building #7, Hill Country Apartments, 213 Argonaut, El Paso, Texas.
3. Five (5) ounces of brown heroin is a large amount of heroin and is sufficient for commercial purposes.
4. Lactose powder, commonly known as "milk sugar", rubber balloons, and balance beam scales, graduated in gram measurements, are common equipment and paraphernalia used in the preparation of heroin for commercial distribution.

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5. The search warrant obtained by Drug Enforcement Administration Agents from the 65th Judicial District Court was a lawful search warrant, based upon sufficient probable cause, and was executed properly, pursuant to Federal Rules of Criminal Procedure. Certain failures in the return procedure occurred, because the defendants and the contraband seized were not brought before the issuing Magistrate, but were taken before a United States Magistrate. The procedural requirements of Rule 41(d), Federal Rules of Criminal Procedure are essentially ministerial in nature. *United States v. Hall*, 505 F. 2d 961 (3rd Cir. 1974).
6. The defendant has not demonstrated prejudice from the above mentioned violation of Rule 41, and for this reason the remedy of suppression of the evidence would not render a just determination of the instant proceedings.

SIGNED AND ENTERED this ____ day of July, 1975.

UNITED STATES DISTRICT
JUDGE

CERTIFICATE OF SERVICE

I hereby certify that I have on this 29th day of July, 1975, mailed copies of the foregoing Findings of Fact to:

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Mr. Joseph (Sib) Abraham, Jr.
Suite 505
Caples Building
El Paso, Texas 79901

Frank B. Walker
Assistant U. S. Attorney
P. O. Box 74
El Paso, Texas 79941

(Emphasis supplied)

APPENDIX D

THE DISTRICT COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW IN *UNITED STATES OF AMERICA v. JOHN DAVID MOORE*, NO. EP-75-CR-82.

(Title Omitted)

Filed: August 12, 1975

**FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

On the 25th day of July, 1975, the right to trial by jury having been waived by Defendant in open Court, the cause was regularly called on the docket for hearing on Defendant's Motion to Suppress the evidence and for trial before the Court.

Thereafter, the Court having duly considered the evidence and the summation of counsel, and the Court

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having duly considered the evidence and the summation of counsel and the applicable law hereby makes its Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1.

Apartment #60, Building #7, of the Hill Country Apartments, 213 Argonaut, El Paso, Texas, was under surveillance as a suspected heroin distribution point for at least seven days prior to the arrest of Defendant, John David Moore, on January 7, 1975, at 5:00 o'clock P. M.

2.

An Affidavit and Complaint for Search Warrant was made by Officer Edward Uribe. (Government Exhibit No. 1).

3.

The information contained in the Affidavit of Officer Uribe was obtained from a confidential informant who had been in Apartment #60, Building #7, of the Hill Country Apartments, within the 24-hour period immediately proceeding the time the information was given to Officer Uribe.

4.

The information given by the confidential informant was given to Officers Edward Uribe and Alberto

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Aceves at the same time and in the presence of each other.

5.

Officer Aceves prepared the Affidavit (Government Exhibit No. 1), incorporating the information provided by the confidential informant.

6.

Officer Uribe presented the Affidavit to the Honorable Judge Edward Marquez, Presiding Judge, 65th Judicial District Court of the State of Texas, at El Paso, Texas.

7.

The Honorable Edward Marquez, Judge Presiding in the 65th Judicial District Court of El Paso County, Texas, issued a search warrant at 4:00 P. M. on January 7, 1975. (Government Exhibit No. 2).

8.

Officers of the Drug Enforcement Administration Task Force, acting pursuant to the search warrant issued by the Honorable Edward Marquez, Judge Presiding, 65th Judicial District Court, arrested John David Moore and Isabel Cueva and confiscated a quantity of contraband.

9.

Property seized by virtue of the search warrant included approximately five ounces of brown heroin,

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contained in plastic bags (Government Exhibits 6 and 7), a quantity of rubber balloons (Government Exhibits 9 and 10), a quantity of Lactose powder, commonly used to dilute heroin for sale (Government Exhibit 10), a balance beam scale, graduated in gram measurements, a common unit of measurement in heroin distribution (Government Exhibit No. 8), and other narcotic paraphernalia (Government Exhibit No. 9).

10.

Upon entering Apartment #60, Building #7, of the Hill Country Apartments, 213 Argonaut, El Paso, Texas, officers found one plastic baggie containing heroin on the coffee table and one plastic baggie under the coffee table.

11.

Defendant, John David Moore, was found in close proximity to the abovementioned heroin.

12.

Information revealed by the confidential informant and relied upon in the preparation of the Affidavit disclosed that John David Moore was the occupant of Apartment #60, Building #7, Hill Country Apartments, 213 Argonaut, El Paso, Texas.

13.

The brown powder described in the Affidavit and found pursuant to the search warrant was submitted to

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the Drug Enforcement Administration laboratory for analysis.

14.

The brown powder found as a result of the search warrant is heroin.

15.

If the official government chemist were called, qualified as an expert and sworn as a witness, he would testify that the substance referred to in the Indictment has been chemically tested and is heroin.

CONCLUSIONS OF LAW

1.

John David Moore was the occupant of Apartment #60, Building #7, Hill Country Apartments, 213 Argonaut, El Paso, Texas, on January 7, 1975, at 5:00 o'clock P. M.

2.

John David Moore was in possession of the contraband confiscated pursuant to a search warrant executed at Apartment #60, Building #7, Hill Country Apartments, 213 Argonaut, El Paso, Texas.

3.

Five ounces of brown heroin is a large amount of heroin and is sufficient for commercial purposes.

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4.

Lactose powder, commonly known as "milk Sugar", rubber balloons, and balance beam scales, graduated in gram measurements, are common equipment and paraphernalia used in the preparation of heroin for commercial distribution.

5.

The search warrant obtained by Drug Enforcement Administration agents from the 65th Judicial District Court was a lawful search warrant, based upon sufficient probable cause, and was executed properly, pursuant to Federal Rules of Criminal Procedure. Certain failures in the return procedure occurred, because the defendants and the contraband seized were not brought before the issuing magistrate, but were taken before a United States Magistrate. The procedural requirements of Rule 41(d), Federal Rules of Criminal Procedure are essentially ministerial in nature. *United States v. Hall*, 505 F. 2d 961 (3rd Cir. 1974).

6.

The Defendant has not demonstrated prejudice from the abovementioned violation of Rule 41, and for this reason the remedy of suppression of the evidence would not render a just determination of the instant proceedings.

/s/ WILLIAM S. SESSIONS
WILLIAM S. SESSIONS
United States District
Judge

August 12, 1975

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APPENDIX E

**THE DISTRICT COURT'S AMENDMENT OF
FINDING OF FACT NO. 12.**

(Title Omitted)

NO. EP-75-CR-82

Filed: Nov. 17, 1975

**NOTICE OF AMENDMENT
TO FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

Pursuant to Rule 36 of the Federal Rules of Criminal Procedure, the Court herein amends Finding of Fact No. 12 in the above styled and numbered cause to read as follows:

'Information revealed by the confidential informant and relied upon in the preparation of the affidavit disclosed that John David Moore was the occupant of Apartment 60, Building No. 7, Hill Country Apartments, 213 Argonaut, El Paso, Texas, at the time of the seizure.'

/s/ WILLIAM D. SESSIONS
United States District
Judge

APPENDIX F

THE GOVERNMENT/APPELLEE'S BRIEF TO THE
UNITED STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT — PERTINENT PORTIONS OF
POINT I RELATING TO THE ISSUE OF SUFFICIENCY OF EVIDENCE FOR CONVICTION.

"Applying these guidelines to the instant facts, it is plain that the evidence is sufficient to sustain the Court's verdict. Appellant has omitted to recite that the confidential informant told the agents that appellant was in possession of a quantity of heroin at his apartment, the subject of the affidavit, only two hours prior to execution of the search warrant. It is difficult to imagine a more recent connection in time between information provided by a confidential informant and observance of the actual facts by agents. The allegation by the confidential informant that John David Moore was the occupant of the apartment which was the subject of the search warrant was borne out by the agents' arrival within a two-hour time span (Tr. 18). Further, information was received by the agents twenty to thirty days prior to execution of the warrant that appellant's apartment and appellant were involved in the drug traffic. It is interesting to note that this information was received not only from the confidential informant who supplied affiants with their information, but from other sources, even from a different confidential informant (Tr. 30-32).

This fact situation can be distinguished from one where agents receive information for the first time, act quickly upon that information, and find a person present on the premises when a search warrant is execut-

ed. The possibility for error in such a situation is obvious. However, in the instant fact situation, information was received almost a month prior to execution of the search warrant that appellant was involved in drug trafficking out of the apartment named in the affidavit and the location was under surveillance during the entire period between receipt of the information and execution of the search warrant. Also, the affidavit alleged that John David Moore, appellant, was the possessor of the contraband and the occupant of the apartment; appellant was not named as "others". The Court found in its Findings of Fact that appellant was found in close proximity to the contraband and that in addition to the contraband, the agents seized a quantity of rubber balloons, lactose powder, a balance beam scale, and other narcotic paraphernalia (R. 55), (Tr. 50-52).

In *United States v. Rodriguez*, 498 F.2d 302 (5th Cir. 1974), this Court held:

"... possession may be actual or constructive. Constructive possession exists when one has dominion and control over the drug. 'Such possession need not be exclusive, but may be shared with others, and is susceptible of proof by circumstantial as well as direct evidence.' *Garza v. United States*, 385 F.2d 899 at 901 (5th Cir. 1967)."

United States v. Gomez-Rojas, 507 F.2d 1213 (5th Cir. 1975); *United States v. Ferg*, 504 F.2d 914 (5th Cir. 1974); *United States v. Richardson*, 504 F.2d 357 (5th Cir. 1974).

It is plain that the Court concluded that the evidence was inconsistent with the hypothesis of the accused's innocence, *Warner*, supra, and that the inferences drawn from the facts supported the verdict, *Cartwright*, supra, and that there was substantial evidence upon which to base the Court's findings that the accused was guilty, *Blachly*, supra. This issue is without merit."

(Emphasis supplied)

APPENDIX G

United States of America, Plaintiff-Appellee,

v.

John David Moore, Jr., Defendant-Appellant.

NO. 75-3680

SUMMARY CALENDAR*

United States Court of Appeals,
Fifth Circuit.

March 9, 1976

Appeal from the United States District Court for the
Western District of Texas.

* Rule 18, 5 Cir., see *Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al.*, 5 Cir., 1970, 431 F.2d 409, Part I.

Before COLEMAN, GOLDBERG, and GEE, Circuit
Judges.

PER CURIAM:

This appellant, tried to the Court without the intervention of a jury, was convicted of possession 169.5 grams of heroin with intent to distribute it, 21 U.S.C., §841 (a) (1). This appellant attack on the validity of the search warrant and upon the sufficiency of the evidence is without merit.

Accordingly, the judgment of the District Court is

AFFIRMED.

Stamped: DO NOT PUBLISH

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APPENDIX H

In The
United States Court of Appeals
Fifth Circuit

Office of the Clerk

April 22, 1976

TO ALL COUNSEL OF RECORD

Re: 75-3680 — USA v. John David Moore, Jr.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition () for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellant Procedure; Local Fifth Circuit Rule 12) the petition () for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

/s/ SUSAN M. GRAVOIS,
Deputy Clerk

cc: Mr. Joseph Abraham, Jr.
Mr. Frank B. Walker

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APPENDIX I

The following is a summary of the arguments, points of error, and questions raised below.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

ARGUMENT

Messrs. Roberts and Abraham, Counsel for the defendant John David Moore, argued for acquittal only and totally refrained from requesting a new trial (Tr. 75 et seq)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

POINTS OF ERROR FROM APPELLANT'S BRIEF

POINT I

THE DISTRICT COURT ERRED IN RENDERING A VERDICT OF GUILTY AND A JUDGMENT OF CONVICTION FOR POSSESSION OF A SCHEDULE I SUBSTANCE WITH INTENT TO DISTRIBUTE WHERE THE EVIDENCE INTRODUCED AT TRIAL WAS INSUFFICIENT TO SUPPORT CONVICTION OF THAT OFFENSE.

POINT II

THE DISTRICT COURT ERRED IN ITS DENIAL OF APPELLANT'S MOTION TO DISCLOSE THE IDEN-

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TITY OF THE CONFIDENTIAL INFORMANT WHERE THE INFORMANT WAS SHOWN TO HAVE BEEN A MATERIAL WITNESS AND WHERE THE GOVERNMENT WAIVED THE PRIVILEGE THROUGH USE OF THE INFORMANT'S TESTIMONY.

POINT III

THE DISTRICT COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS THE EVIDENCE WHERE SUCH EVIDENCE WAS SEIZED PURSUANT TO A WARRANT WHICH DID NOT MEET THE PROBABLE CAUSE REQUIREMENTS OF THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

QUESTIONS FROM THE APPELLANT'S
SUPPLEMENTARY BRIEF

QUESTION I

IS MERE PRESENCE, OR CLOSE PROXIMITY, OR CLOSE ASSOCIATION, WITH ANOTHER WHO IS IN POSSESSION SUFFICIENT TO SUPPORT A CONVICTION FOR POSSESSION?

QUESTION II

CAN CLOSE PROXIMITY TOGETHER WITH ACCUSATIONS AND ALLEGATIONS FROM UN-NAMED INFORMANTS SUPPORT A CONVICTION FOR POSSESSION?

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QUESTION III

DID THE COURT UTILIZE THE EX PARTE CONVERSATIONS OF THE UNDISCLOSED INFORMANTS TO REACH ITS JUDGMENT OF CONVICTION?

QUESTION IV

IF THE INFORMANTS' CONVERSATIONS MAY BE PROPERLY USED AGAINST THE DEFENDANT, CAN HE BE DENIED THE RIGHTS OF DISCLOSURE AND CONFRONTATION?

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ISSUES FOR RECONSIDERATION FROM THE
APPELLANT'S BRIEF FOR REHEARING

ISSUE I

THE ORIGINAL OPINION CONFLICTS WITH FIFTH CIRCUIT PRECEDENTS WHICH PRECLUDE CONVICTION OF POSSESSION OF CONTRABAND ON EVIDENCE OF MERE PROXIMITY.

ISSUE II

THE ORIGINAL OPINION IGNORES THE DUE PROCESS, RIGHTS OF CONFRONTATION, AND RULES OF EVIDENCE ISSUES RAISED BY THE USE OF HEARSAY STATEMENTS FROM THE UNDISCLOSED INFORMANT BY THE GOVERNMENT IN ITS ARGUMENT FOR CONVICTION AND BY THE COURT IN ITS FINDINGS OF FACT IN SUPPORT OF CONVICTION.